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12 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

13  
14 FEDERAL TRADE COMMISSION, ) Case No. 2:09-CV-01349-PMP-RJJ  
Plaintiff, )  
15 v. )  
16 GRANT CONNECT, LLC, et al., )  
Defendants. )  
18

19  
20 **PLAINTIFF FEDERAL TRADE COMMISSION’S MEMORANDUM**  
**OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT**  
21 **JOHNNIE SMITH’S MOTION TO DISMISS AND TO POSTPONE DISCOVERY**

22 Plaintiff Federal Trade Commission (“FTC”) respectfully submits this memorandum of  
23 points and authorities in opposition to Defendant Johnnie Smith’s Motion to Dismiss Pursuant to  
24 FRCP 12(b)(6) And FRCP 9(b) And to Postpone Discovery [D.E. 149] (“Motion to Dismiss”).  
25

## I. INTRODUCTION

Defendant Johnnie Smith (“Smith”), the Executive Director of Corporate Defendant Vantex Group, LLC (“Vantex”), is one of several Defendants who together stand accused of deceptively marketing multiple products and services, including Grant Connect (an Internet-based computer program that purportedly gets consumers easy access to free government or other grant money), First Plus Platinum (an online shopping club masquerading as a general purpose line of credit), One Hour Wealth Builder (a purported work-from-home business opportunity), and Acai Total Burn (a dietary supplement), all in violation of Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) & 52, and both Section 907(a) of the Electronic Fund Transfer Act (the “EFTA”), 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b).

On July 27, 2009, the FTC filed its Complaint for Permanent Injunction And Other Equitable Relief [D.E. 1] (“Original Complaint”) against multiple defendants, including Vantex. While Smith was not specifically named therein, the Original Complaint contemplated that the named individual defendants were possibly acting “in concert with others.” *See e.g.*, Original Comp. [D.E. 1] ¶¶ 13, 16 (alleging that defendants Rachael A. Cook (“Cook”), Vantex’s Manager, and Juliette M. Kimoto (“Juliette Kimoto”), ultimately Vantex’s owner, acting alone or in concert with others formulated, directed, controlled, had authority to control, or participated in the acts and practices of Vantex). On July 28, 2009, the Court entered an *ex parte* temporary restraining order (“TRO”) against all of the then-named defendants, including Vantex, Cook, and Juliette Kimoto. On September 22, 2009, after full briefing and a hearing, the Court issued a preliminary injunction [D.E. 83] (“P.I. Order”) against the Las Vegas Defendants,<sup>1</sup> including Vantex, Cook, and Juliette Kimoto. In granting the preliminary injunction, the Court found that

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<sup>1</sup> The Reno Defendants stipulated to a preliminary injunction before the hearing. See Stipulated Preliminary Injunction as to Defendants Grant Connect, LLC; Horizon Holdings, LLC; O’Connell Gray, LLC; James J. Gray; and Randy D. O’Connell [D.E. 48].

1 there was good cause to believe that all of the then-named defendants violated the FTC Act and  
2 the EFTA by: (1) misrepresenting the likelihood that consumers will get grants and/or “free  
3 money” using Grant Connect; (2) failing to disclose, or disclose adequately, that consumers who  
4 sign up for Defendants’ products or services are enrolled in multiple membership programs and  
5 must cancel the programs within a limited time period to avoid costly recurring monthly charges;  
6 (3) deceptively marketing their “line of credit” offers, including First Plus Platinum, by making  
7 false claims and failing to disclose material facts about the limitations of this credit line; and (4)  
8 debiting consumers’ bank accounts on a recurring basis without obtaining a written authorization  
9 as required by the EFTA. P.I. Order [D.E. 83] at pp. 13-15. The P.I. Order enjoined these  
10 practices. Among other things, it also required the then-named defendants, including Vantex, to  
11 distribute the preliminary injunction order to, *inter alia*, each of their officers, directors,  
12 employees, agents, and representatives. P.I. Order [D.E. 83] § XXI at p. 42. This would  
13 necessarily include Smith who as an officer, agent and/or employee of Vantex would have been  
14 bound by the preliminary injunction upon receiving actual notice of it pursuant to Rule 65(d)(2)  
15 of the Federal Rules of Civil Procedure.

16 On April 21, 2010, the FTC filed its Amended Complaint for Permanent Injunction And  
17 Other Equitable Relief (“Amended Complaint”) specifically naming several additional  
18 defendants, including Smith. Despite detailed allegations that fully describe Defendants’  
19 deceptive schemes and Smith’s role, Smith seeks dismissal of the Amended Complaint under  
20 Federal Rules of Civil Procedure 12(b)(6) and 9(b) and a stay of discovery pending the outcome  
21 of his motion. Specifically, Smith argues that: (1) Counts I-VII of the Amended Complaint fail  
22 to make sufficiently individualized allegations against Smith as required under Rule 9(b)’s  
23 heightened pleading standards; and (2) Count VIII, alleging claims under the EFTA, is time-  
24 barred. As explained below, Rule 9(b)’s heightened pleading requirements do not apply to  
25 actions brought under the FTC Act because they neither allege fraud nor sound in fraud.

1 Moreover, the Amended Complaint allegations are detailed enough to satisfy Rule 9(b)'s  
2 heightened pleading requirements.

3 Smith's argument with regard to Count VIII is equally flawed in that it is based on a one-  
4 year limitations period that is not applicable to enforcement actions brought by the FTC.  
5 Nonetheless, Count VIII would survive even if the one-year limitation period applied because the  
6 Amended Complaint relates back to the date of the Original Complaint pursuant to Rule of Civil  
7 Procedure 15(c)(1)(C). In any event, even without relation back, and assuming a one-year  
8 limitations period, Defendants' EFTA violations were ongoing at the time of the July 28, 2009  
9 TRO and, therefore, would not be time barred until July 28, 2010.

10 Accordingly, the Court should deny Smith's Motion to Dismiss and discovery should  
11 continue.

12 **II. ALLEGATIONS PERTAINING TO DEFENDANT JOHNNIE SMITH**

13 **A. SUMMARY OF COUNTS CONTAINED IN THE AMENDED COMPLAINT**

14 The Amended Complaint contains a total of eight counts, each of which implicates  
15 Defendant Johnnie Smith.

16 Count I alleges that the Defendants violated Section 5(a) of the FTC Act by  
17 misrepresenting and failing to substantiate claims that consumers who purchased and used their  
18 grant-related products and services were likely to obtain a government or other grant. Am.  
19 Compl. [D.E. 112] ¶¶ 84-86.

20 Count II alleges that the Defendants violated Section 5(a) of the FTC Act by deceptively  
21 marketing their "line of credit" products or services by falsely representing that consumers  
22 would or were likely to receive a general purpose unsecured credit card or line of credit with a  
23 credit limit between \$5,000 and \$10,000 at 0% interest for 12 months. Am. Compl. [D.E. 112]  
24 ¶¶ 87-89.

25 Count III alleges that the Defendants violated Section 5(a) of the FTC Act by failing to

1 adequately disclose material terms and conditions of their line of credit offer, including that: (i)  
2 consumers were joining the Defendants' online shopping club; (ii) the "line of credit" could only  
3 be used to buy items exclusively from Defendants' online shopping clubs; (iii) the "line of  
4 credit" could not be used to purchase all items available through Defendants' shopping clubs in  
5 that some items require a significant deposit prior to shipping; and (iv) certain fees and charges  
6 applied to the "line of credit" offer. Am. Compl. [D.E. 112] ¶¶ 90-92.

7 Count IV alleges that the Defendants violated Section 5(a) of the FTC Act by falsely, and  
8 without substantiation, claiming that consumers who purchased their work-from-home schemes  
9 were likely to earn substantial income with minimal effort. Am. Compl. [D.E. 112] ¶¶ 93-95.

10 Count V alleges that the Defendants violated Sections 5(a) and 12 of the FTC Act by  
11 making unsubstantiated representations that consumers who purchased Acai Total Burn would  
12 build muscle, increase their metabolism, lose weight, increase their energy, diminish their  
13 fatigue, and slow down the aging process. Am. Compl. [D.E. 112] ¶¶ 96-98.

14 Count VI alleges that the Defendants violated Sections 5(a) and 12 of the FTC Act by  
15 falsely representing that their products or services are used, endorsed, or approved by  
16 specifically identified consumers, including celebrities such as Oprah Winfrey, Rachel Ray, Brad  
17 Pitt, Kate Hudson and Denise Richards. Am. Compl. [D.E. 112] ¶¶ 99-101.

18 Count VII alleges that the Defendants violated Section 5(a) of the FTC Act by falsely  
19 claiming that their products and services were available at a very low cost while failing to  
20 disclose the material terms and conditions of their offers, including: (i) that consumers who sign  
21 up for one of the Defendants' products or services are enrolled in a membership program for that  
22 product or service and must cancel the program within a limited time period to avoid additional  
23 charges; (ii) that consumers who sign up for one of the Defendants' products or services will be  
24 charged for additional unrelated products or services unless consumers take affirmative action to  
25 avoid the charges; and (iii) the amounts of such charges. Am. Compl. [D.E. 112] ¶¶ 102-104.

1 Count VIII alleges that the Defendants violated Section 907(a) of the EFTA, 15 U.S.C. §  
2 1693e(a), Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), and the FTC Act by  
3 debiting consumers' bank accounts on a recurring basis without obtaining a written authorization  
4 signed or similarly authenticated by consumers and without providing a copy of the signed  
5 authorization to consumers. Am. Compl. [D.E. 112] ¶¶ 108-111.

6 **B. ADDITIONAL FACTUAL AVERMENTS PERTAINING TO DEFENDANT**  
7 **JOHNNIE SMITH**

8 The allegations in Counts I-VIII of the Amended Complaint are supported by the  
9 following factual averments pertaining to Defendant Johnnie Smith:

10 **1. Defendants Johnnie Smith and Vantex Group, LLC**

11 Defendant Johnnie Smith ("Smith") is the Executive Director of Defendant Vantex  
12 Group, LLC ("Vantex"). At times material to this Complaint, acting alone or in concert with  
13 others, he has formulated, directed, controlled, had the authority to control, or participated in the  
14 acts and practices of Vantex and/or one or more of the other business entities named herein,  
15 including the acts and practices set forth in this Complaint. Smith resides in Miami, Florida. In  
16 connection with the matters alleged herein, he transacts or has transacted business in this District.  
17 Am. Compl. [D.E. 112] ¶ 36. Vantex is a Nevada limited liability company with its principal  
18 place of business at 6060 W. Elton Avenue, Suite A, Las Vegas, Nevada. Vantex transacts or  
19 has transacted business in this District and throughout the United States. Am. Compl. [D.E. 112]  
20 ¶ 24.

21 **2. Common Enterprise**

22 Defendants Grant Connect LLC, Horizon Holdings, LLC ("Horizon Holdings"),  
23 O'Connell Gray, LLC ("O'Connell Gray"), Consolidated Merchant Solutions, LLC ("CMS"),  
24 OS Marketing Group, LLC ("OS"), Acai, Inc. ("Acai"), AllClear Communications, Inc.  
25 ("AllClear"), Dragon Group, Inc. ("Dragon"), Elite Benefits, Inc. ("Elite"), Global Fulfillment,

1 Inc. (“Global Fulfillment”), Global Gold, Inc. (“Global Gold”), Global Gold Limited (“Global  
2 Gold NZ”), Healthy Allure, Inc. (“Healthy Allure”), MSC Online, Inc. (“MSC”), Paid To  
3 Process, Inc. (“Paid To Process”), Premier Plus Member, Inc. (“PPM”), Total Health, Inc.  
4 (“Total Health”), Vcomm, Inc. (“Vcomm”), Vantex, Vertek Group, LLC (“Vertek”), Pink LP  
5 (“Pink”), and the Juliette M. Kimoto Asset Protection Trust (“Kimoto Trust”) (collectively  
6 “Corporate Defendants”) have operated as a common enterprise while engaging in the deceptive  
7 acts and practices and other violations of law alleged below. Because these Corporate  
8 Defendants have operated as a common enterprise, each of them is jointly and severally liable for  
9 the acts and practices alleged below. Individual Defendants Cook, Gray, Michael Henriksen,  
10 Steven Henriksen, Jn Paul, Juliette Kimoto, Kyle Kimoto, O’Connell, and Smith have  
11 formulated, directed, controlled, had the authority to control, or participated in the acts and  
12 practices of the Corporate Defendants that constitute the common enterprise. Am. Compl. [D.E.  
13 112] ¶ 37.

### 14 **3. Defendants’ Business Practices**

15 Defendants advertise, market, distribute, promote and sell a variety of products and  
16 services to consumers throughout the United States, including but not limited to: Grant Connect,  
17 First Plus Platinum, One Hour Wealth Builder, and Acai Total Burn. Am. Compl. [D.E. 112] ¶  
18 39.

#### 19 **a. Defendants’ Misrepresentations Regarding Grant Connect**

20 On the Vantex website, [www.vantexgroup.com](http://www.vantexgroup.com), which Defendants use to recruit affiliate  
21 marketers, Defendants describe Grant Connect as “a unique, consumer-friendly US government  
22 grant program that delivers all of the tools for the consumer to search multiple databases, write  
23 grant proposals and deliver polished plans all from one easy to use interface.” Am. Compl. [D.E.  
24 112] ¶ 40.

25 Defendants offer Grant Connect to consumers through one of their Internet websites,

1 www.grantconnectoffer.com (the “Grant Connect Offer Site”), and through a variety of other  
2 channels, including affiliated websites and blogs. Am. Compl. [D.E. 112] ¶ 41, Px. 1 (a screen  
3 print of the Grant Connect Offer Site homepage). In their advertising, Defendants represent to  
4 consumers that they are likely to obtain grants, if they sign up for Grant Connect. Am. Compl.  
5 [D.E. 112] ¶ 42. Typical representations made on the Grant Connect Offer Site include, but are  
6 not limited to, the following:

- 7 • “Over \$10 Billion Issued in 2009 Already!”
- 8 • “\$15 Billion In Grant Money Available.”
- 9 • “EASY TO USE PROGRAM:  
10 Instantly find the Grant that’s right for you!  
11 Receive your government funds!”
- 12 • “Get Grant Connect Today!  
13 Billions of dollars are being spent every month by the government trying to  
14 help stabilize the economy. With billions more on the way, it’s time for you  
15 to get your cut! Grants are FREE MONEY given by foundations or the  
16 government to help you with your financial situation. Not only is this money  
17 non-taxable and interest-free, but most of the time you don’t even have to pay  
18 it back!”
- 19 • “The Grant Connect Advantage  
20 Why spend days searching through government databases, when you could  
21 have our program do it for you? This is the Grant Connect difference. Our  
22 program makes the process FAST and EASY, so all you have to worry about  
23 is where to spend your money!”

24 Am. Compl. [D.E. 112] ¶ 43.

25 The Grant Connect Offer Site also features testimonials from consumers who rave about



1 Grant Connect. For example, purported Grant Connect user Tahani Hanania exclaims: “It’s just  
2 so easy! I got my first grant for \$330,000. All I have to do is search and click!” Similarly,  
3 Catherine Roberts proclaims: “I received \$850,000 for my business. I’m not very experienced  
4 with computers and your service made everything so simple for me. I don’t know why anybody  
5 would use any other program!” Am. Compl. [D.E. 112] ¶ 44.

6 In many instances, Defendants bolster these claims by using images of President Obama  
7 and Vice President Biden in their advertising. For example, beginning on or about January 20,  
8 2009, and continuing until at least March 3, 2009, the Grant Connect Offer Site featured a  
9 picture of President Obama and Vice President Biden standing together in front of a waving  
10 American flag and next to the Grant Connect logo with a caption in large blue and red letters  
11 which read: “CHANGE Is Here! \$15 BILLION in FREE Government MONEY for you!” Am.  
12 Compl. [D.E. 112] ¶ 45, Px. 2 (a print-out of the Grant Connect Offer Site homepage as it  
13 appeared on March 3, 2009).

14 Defendants’ marketing efforts also include the use of pop ups and chat boxes designed to  
15 discourage consumers from leaving the Grant Connect Offer Site. In many instances, when  
16 consumers attempt to leave the Grant Connect Offer Site, a confirmation box pops up urging  
17 consumers to remain on the site. At the same time, a chat box pops up on the screen featuring a  
18 chat agent that attempts to convince the consumer to sign up for Grant Connect. Am. Compl.  
19 [D.E. 112] ¶ 46, Px. 3 (screen prints of the Grant Connect Offer Site, which capture the  
20 appearance of a confirmation box and chat box). Defendants use the chat boxes to interact  
21 directly with consumers by exchanging text messages with them in real-time. Typical  
22 representations made by Grant Connect chat agents to consumers include, but are not limited to,  
23 the following:

- 24 • “Hi and thanks for chatting with me! Because you’ve come this far we’d like  
25 to give you our Grant Connect program for only a .99 cent [sic] processing fee

1 today. [CLICK HERE](#) to get this special offer!”

- 2 • “How surprised will you be to know there is a lot of money out there for  
3 people just like you and our program will show you how to get it!! Because  
4 this is a special promotion you need to act right away!
- 5 • “Are you ready to give it a try and get your Free Grant Money?”

6 Am. Compl. [D.E. 112] ¶ 47.

7 Despite the numerous representations on the site regarding the ease of receiving a grant,  
8 in truth and in fact, consumers using Grant Connect are not likely to obtain a grant from any  
9 source. Grants have strict eligibility criteria which applicants must meet before a grant  
10 application will even be considered. Even when an applicant meets these criteria, successful  
11 grant seeking is not quick and easy. Rather, to be successful, grant applicants must carefully  
12 research suitable opportunities, and initiate the proposal process months, or even a year, before  
13 the deadline. Additionally, few grants are available to businesses involved in profit-making  
14 projects. Instead, the bulk of grants are awarded to colleges, universities and other nonprofit  
15 organizations. There are few, if any, grants available to the average individual consumer. Am.  
16 Compl. [D.E. 112] ¶ 48.

17 **b. Defendants’ Phony “Line of Credit” Offers**

18 Defendants also advertise, market, distribute, promote and sell “line of credit” products  
19 or services, including First Plus Platinum, through multiple Internet websites, including  
20 [www.firstplusplatinumoffer.com](http://www.firstplusplatinumoffer.com) (the “First Plus Platinum Offer Site”), and through a variety of  
21 channels, including affiliated websites and blogs. Am. Compl. [D.E. 112] ¶ 49, Px. 6 (a screen  
22 print of the homepage of the First Plus Platinum Offer Site).

23 In their advertising, Defendants represent to consumers that if they apply and pay a  
24 modest processing fee they will receive a general purpose unsecured credit card or line of credit  
25 with a credit limit between \$5,000 and \$10,000 at 0% interest for 12 full months. Am. Compl.

1 [D.E. 112] ¶ 50. For example, typical representations made on the First Plus Platinum Offer Site  
2 include, but are not limited to, the following:

- 3 • “\$7,500 CREDIT LINE”
- 4 • “Would You Like a Guaranteed \$7,500 Unsecured Credit Line & 0% Interest  
5 For the First 12 Months!”
- 6 • “FINALLY... YOUR APPROVAL IS GUARANTEED!  
7 Are you tired of being turned down for credit accounts?  
8 There is hope, we believe in giving everyone a chance...”
- 9 • “Activate today and receive...  
10 0% INTEREST FOR 12 FULL MONTHS!”
- 11 • “We understand that sometimes it may be very difficult to get approved for  
12 credit. That is why we have come up with this **LIMITED TIME OFFER**.  
13 Take this opportunity to treat yourself or your family and friends to something  
14 nice. With your **\$7,500 Credit Line** you can purchase many of the things you  
15 have always wanted.
- 16 • “Don’t be fooled by other credit offers that lure you in with a low interest rate  
17 for only a short amount of time. Take advantage of this great offer now,  
18 **APPROVAL IS GUARANTEED!** What are you waiting for?”
- 19 • “No Credit Checks  
20 No Employment Verification  
21 Bankruptcy? No Problem!  
22 Bad Credit? No Credit? No Problem!”

23 Am. Compl. [D.E. 112] ¶ 51.

24 Defendants’ advertising also features testimonials from purported consumers who are  
25 pleased with their line of credit. For example, purported First Plus Platinum customer A. Harris

1 states: “I just wanna say thank you for my \$7,500.00 line of credit...that’s unbelievable!!! I, like  
2 many people these days, don’t have the best credit in the world and was turned down quite a few  
3 times for credit. You guys gave me and my family a second chance. It’s great to purchase the  
4 products I want with no interest for the first year...thanks again.” Am. Compl. [D.E. 112] ¶ 52.

5 In many instances, Defendants reinforce the impression that consumers will receive a  
6 general purpose unsecured credit card or line of credit by prominently displaying pictures of  
7 what appear to be credit cards in their advertising. Am. Compl. [D.E. 112] ¶ 53.

8 In truth and in fact, consumers who sign up for Defendants’ line of credit offers do not  
9 get a general purpose unsecured credit card or line of credit. Instead, Defendants enroll  
10 consumers in a costly online shopping club where they can only purchase certain merchandise  
11 items on credit. In many instances, Defendants require a substantial cash deposit, in some  
12 instances up to 50% or more, prior to shipping certain merchandise items. In addition,  
13 Defendants fail to adequately disclose additional fees associated with the card. Am. Compl.  
14 [D.E. 112] ¶ 54.

15 **c. Defendants’ Work-From-Home Schemes**

16 Defendants also advertise, market, distribute, promote, and sell multiple work-from-home  
17 opportunities, including Domain Processing, My Search Cash, and One Hour Wealth Builder,  
18 through multiple Internet websites, including [www.onehourwealthbuilderoffer.com](http://www.onehourwealthbuilderoffer.com) (the “One  
19 Hour Wealth Builder Offer Site”), and through a variety of channels, including affiliated  
20 websites and blogs. Am. Compl. [D.E. 112] ¶ 55, Px. 578 (a screen print and printouts of the  
21 homepage of the One Hour Wealth Builder Offer Site).

22 On the Vantex website, Defendants describe One Hour Wealth Builder as “the hot new  
23 BizOp offer giving consumers instant access to a robust home based business program by  
24 signing up for a 7 day, risk-free trial offer for only \$2.78. In addition to valuable information,  
25 users will have access to helpful training videos, step-by-step tutorials and articles on how to

1 make \$1,000's [sic] per month on the Internet flipping domain names." Am. Compl. [D.E. 112]  
2 ¶ 56.

3 In their advertising, Defendants represent to consumers that if they purchase their  
4 programs, consumers will earn substantial income quickly and easily while working from home.  
5 Am. Compl. [D.E. 112] ¶ 57. For example, typical representations made on the One Hour  
6 Wealth Builder Offer Site include, but are not limited to, the following:

- 7 • "Try it Now Risk Free!  
8 Work From Home for Just 1 Hour a Day!"
- 9 • "You can begin earning hundreds to thousands of dollars a day in just a few  
10 easy steps..."
- 11 • "Making Money is as Easy as 1,2,3"
- 12 • "Work from home, be your own boss, work whenever you like and **make as**  
13 **much money as you want!** With rising gas prices, **you can make more**  
14 **money by staying at home.** One Hour Wealth Builder is the key to unlimited  
15 wealth, unlimited free time to spend with your family and friends, and  
16 independence from the confines of an office job."
- 17 • "Remember, **ANYONE** can do this. With our proven method, you can  
18 immediately begin earning hundreds to thousands of dollars a day, in just a  
19 few minutes of your spare time—all from the comfort of your own home!

- 1           •       “With our method, processing a single domain takes only 15 minutes out of  
2 your day. Making at least \$45 per domain, you can process four or more  
3 domains in an hour and make more than \$180! That means in just a few hours  
4 a day you can make a week’s salary, and in a full work-week you can earn  
5 more than what most people make in a month! Follow our earnings chart to  
6 see examples of how much you can make:

7

8 Domains You Process Per Day	Money You Make Per Day	Money You Make Per Week	Money You Make Per Month	Money You Make Per Year
9 6 (\$45 each)	\$270.00	\$1,350.00	\$5,805.00	\$69,660.00
10 8 (\$45 each)	\$360.00	\$1,800.00	\$7,740.00	\$92,880.00
11 10 (\$45 each)	\$450.00	\$1,935.00	\$8,320.50	\$99,846.00
12 12 (\$45 each)	\$540.00	\$2,700.00	\$11,610.00	\$139,320.00
13 15 (\$45 each)	\$675.00	\$3,375.00	\$14,512.50	\$174,150.00”

14  
15 Am. Compl. [D.E. 112] ¶ 58.

16           Defendants’ advertising also features testimonials from consumers who make earnings  
17 claims. For example, purported One Hour Wealth Builder customer Charles Puckett claims: “I  
18 can’t believe it. In 2 days I made **\$500** AND it was my very first transaction. I must tell you, I  
19 still can’t believe how easy it was. Thanks, Matt, for all the great training materials.” Similarly,  
20 Don Waddington proclaims: “On my very first processing experience, I made \$1,000 in a  
21 week!! Since then, I made another **\$995** in profits free and clear...I never really made money  
22 this easily before.” Am. Compl. [D.E. 112] ¶ 59.

23           In truth and in fact, few, if any, consumers who sign up for Defendants’ work-from-home  
24 schemes earn the substantial income promised by Defendants. Most, if not all, enrolled  
25 consumers did not earn any money whatsoever. Am. Compl. [D.E. 112] ¶ 60.

1                   **d. Defendants' Misrepresentations Regarding Acai Total Burn**

2                   Defendants also advertise, market, distribute, promote, and sell various purported  
3 nutraceuticals, including Acai Total Burn, through multiple Internet websites, including  
4 www.acaitotalburnoffer.com (the "Acai Total Burn Offer Site"), and through a variety of  
5 channels, including affiliated websites and blogs. Am. Compl. [D.E. 112] ¶ 61, Px. 579 (a  
6 screen print of the homepage of the Acai Total Burn Offer Site).

7                   In their advertising, Defendants represent to consumers that if they use Acai Total Burn  
8 they will build muscle, increase their metabolism, lose weight, gain energy, diminish their  
9 fatigue, and slow down the aging process. Am. Compl. [D.E. 112] ¶ 63. For example, typical  
10 representations made on the Acai Total Burn Offer Site include, but are not limited to, the  
11 following:

- 12                   • "Discover the Weight Loss Secrets of the Rainforest  
13                   Acai is the number one superfood in the world and now we're making it  
14                   available to you!"
- 15                   • "Why Use Acai Total Burn?"
  - 16                   ❖ Highest Antioxidants of any Food!
  - 17                   ❖ #1 Weight Loss Supplement of 2008!
  - 18                   ❖ Oprah and Rachael Ray Approved
  - 19                   ❖ Helps Increase Your Metabolism
  - 20                   ❖ Fight Fatigue & Increase Energy
  - 21                   ❖ Slows down the aging process"
- 22                   • "Acai Berry is filled with vitamins and minerals that can aid in weight loss,  
23                   building muscle and increase overall energy and is rich in antioxidants, fatty  
24                   acids, fiber and plant compounds that can increase your health. It will be  
25                   easier to reach your perfect weight! Get Started Today!

- 1 • “Discover the Secret Celebrities have been using for years! Acai is used by  
2 celebrities like Brad Pitt, Kate Hudson, Denise Richards and more. To keep  
3 them looking young and feeling energized.”

4 Am. Compl. [D.E. 112] ¶ 64.

5 In truth and in fact, Defendants did not possess and rely upon a reasonable basis to  
6 substantiate representations that consumers who use Acai Total Burn will build muscle, increase  
7 their metabolism, lose weight, gain energy, diminish their fatigue, and slow down the aging  
8 process. Am. Compl. [D.E. 112] ¶ 65.

9 **e. Defendants’ Failure to Disclose Material Terms regarding Their**  
10 **Offers**

11 In addition to the misrepresentations described above, in making their various offers,  
12 including but not limited to Grant Connect, First Plus Platinum, One Hour Wealth Builder and  
13 Acai Total Burn, Defendants fail to disclose material terms including:

- 14 • that consumers who sign up for one of the Defendants’ products or services  
15 are enrolled in a membership program for the product or service and must  
16 cancel the program within a limited time period to avoid additional charges;
- 17 • that consumers who sign up for one of the Defendants’ products or services  
18 will be charged for additional unrelated products or services unless consumers  
19 take affirmative action to avoid the charges; and
- 20 • the amounts of such charges.

21 Am. Compl. [D.E. 112] ¶ 66.

22 For example, Defendants induce consumers to sign up for Grant Connect by offering it at  
23 a very low cost, ranging from \$0.99 to \$2.78, which they frame as a “processing” fee. Am.  
24 Compl. [D.E. 112] ¶ 67. Consumers who wish to sign up for Grant Connect go through a two-  
25 step process. The first step begins on the homepage of the Grant Connect Offer Site. *See* Pl.’s



1 Exs. 1-2. In addition to the representations described in Paragraphs 42 and 43 of this Complaint,  
2 this part of the website invites consumers to “Get Started Today!” by disclosing their name,  
3 address, email, and phone number on a form and clicking on the green “Get Access Now!” or  
4 “Find My Money!” buttons. No fees or costs are mentioned in this part of the website. Instead,  
5 consumers are asked to check a box next to text stating, “I have Read & Agree with the Privacy  
6 Policy,” before they can proceed. There is also a tiny disclaimer at the very bottom of the  
7 homepage, which would require significant scrolling to reach, that states, “Users submitting this  
8 form acknowledge their acceptance of the Privacy Policy / Terms and Conditions of this Web  
9 Site.” To actually view the Terms and Conditions from the homepage, a consumer would have  
10 to click on the phrase “Terms and Conditions” in this disclaimer. Am. Compl. [D.E. 112] ¶ 68,  
11 Px. 4 (a print out of one version of the Grant Connect Terms and Conditions).

12 Consumers who complete step one arrive at step two, a second page on the Grant  
13 Connect Offer Site where they can complete the sign-up process. This page of the website is  
14 substantially similar to the Grant Connect Offer Site homepage. It features the same graphics,  
15 testimonials, and representations regarding the likelihood of obtaining grants using Grant  
16 Connect, and a similar layout. The form with the information provided by the consumer is still  
17 displayed, however, the form now contains fields for consumers to enter their credit or debit card  
18 type, number, expiration date, and authorization code. In addition, the form in the second step  
19 contains text at the top, which reads either, “Limited Time: \$2.78 Today Only!” or “Limited  
20 Time: \$.99 Today Only!” Am. Compl. [D.E. 112] ¶ 69, Px. 5 (a screen print of the second page  
21 of the Grant Connect Offer Site).

22 In some instances, consumers also are asked to check a box next to new text stating, “I  
23 have Read & Agree with the Terms and Conditions, Privacy Policy, and Offer Details below”  
24 before they can proceed. This checkbox appears only during step two of the signup process. In  
25 some instances, there is also a tiny disclaimer at the bottom of the page that states, “Users

1 submitting this form acknowledge their acceptance of the Privacy Policy / Terms and Conditions  
2 of this Web Site.” To actually view the Terms and Conditions from the second page of the Grant  
3 Connect Offer Site, a consumer would have to click on the phrase, “Terms and Conditions,”  
4 contained in the text next to the checkbox or in the disclaimer at the bottom the page. Am.  
5 Compl. [D.E. 112] ¶ 70.

6 In numerous instances, Defendants enroll consumers in a costly membership program for  
7 Grant Connect and charge consumers’ credit cards or debit their bank accounts on a recurring  
8 monthly basis unless the consumers cancel their memberships within seven days of being  
9 enrolled. Defendants charge or debit consumers \$39.95 per month if they do not cancel their  
10 membership within the seven day period. Am. Compl. [D.E. 112] ¶ 71.

11 In numerous instances, Defendants also enroll consumers in, and charge their credit cards  
12 or debit their bank accounts for, additional products and services, including, but not limited to:  
13 ID Pro Alert (described by Defendants as “identity theft protection”), ID Lock On (described by  
14 Defendants as “identity theft protection”), Member Legal Net (described by Defendants as “a  
15 team of legal experts to help anytime you need them!”), and/or SmartHealth Gold (described by  
16 Defendants as “quality, affordable health benefits”). Am. Compl. [D.E. 112] ¶ 72.

17 Charges for Grant Connect and these additional products and services are not adequately  
18 disclosed. Am. Compl. [D.E. 112] ¶ 73. In some instances, the following inadequately disclosed  
19 language appears in small densely packed text below the “Get Access Now!” button on the  
20 second page of the Grant Connect Offer Site:

21 OFFER DETAILS: By clicking “Submit” I am authorizing Grant Connect to  
22 charge my credit or debit card a \$2.78 processing fee for my 7 days trial  
23 membership. After the 7 day trial, if I do not call customer service to cancel, the  
24 account I provided here will be charged \$39.95 each month thereafter. I may  
25 cancel by calling the customer service number of Grant Connect listed in the

1 Terms and Conditions.

2 As an additional bonus, you will also receive a 14 day trial of SmartHealth Gold  
3 medical and lifestyle benefits for a processing fee of \$1.65. Unless you cancel,  
4 SmarthHealth Gold will bill your account \$19.95 for the services each month  
5 thereafter. You have the right to cancel by calling the number listed at  
6 smarthealthgold.com.

7 As an additional bonus, I agree to receive a 14 day trial to MemberLegalNet.

8 After the trial period, unless I cancel, MemberLegalNet will charge my account  
9 \$12.95 a month thereafter. I may cancel by calling the toll free number located at  
10 memberlegalnet.com.

11 Am. Compl. [D.E. 112] ¶ 74.

12 The inconspicuous Grant Connect “Offer Details” and “Terms and Conditions” fail to  
13 adequately inform consumers that they will be enrolled in and charged for a membership  
14 program if they fail to cancel within seven days, and that they will be enrolled in and charged for  
15 additional products or services, including, but not limited to: ID Pro Alert, ID Lock On, Member  
16 Legal Net and/or SmartHealth Gold, especially in light of the Defendants’ more prominent  
17 representations that consumers will receive Grant Connect at a very low cost ranging from \$0.99  
18 to \$2.78. Am. Compl. [D.E. 112] ¶ 75.

19 In numerous instances, consumers learn that Grant Connect is a costly membership  
20 program, and that they have been enrolled for one or more additional products or services only  
21 after their accounts have been charged. Am. Compl. [D.E. 112] ¶ 76.

22 Defendants also use websites that promote non-grant related products or services to enroll  
23 consumers in the Grant Connect membership program and to charge their credit cards or debit  
24 their bank accounts. Am. Compl. [D.E. 112] ¶ 77. For example, on the First Plus Platinum  
25 Offer Site Defendants fail to disclose, or to disclose adequately, to consumers who apply for

1 First Plus Platinum cards that they will be enrolled in, and that their credit or debit card will be  
2 charged for, membership programs, including First Plus Platinum and additional products or  
3 services, such as Grant Connect. Am. Compl. [D.E. 112] ¶ 78.

4 In some instances, fine print at the bottom of the First Plus Platinum Offer Site states:

5 Offer Details: By submitting this order you give First Plus Platinum Credit  
6 authorization to charge your debit or credit card a processing fee of \$2.78 for the  
7 7 day trial membership. The \$7,500 credit account is for use toward thousands of  
8 our merchandise items only. After the 7 day trial, unless you cancel, we will  
9 automatically bill the account your provided us today for \$39.95, and each month  
10 thereafter. All monthly fees will be applied to any outstanding line of credit  
11 balance. This charge will appear as debit by “Credit Line” on your statement.  
12 You have the right to cancel any time by calling the toll-free number provided in  
13 the Terms and Conditions.

14 You also agree to receive a 15 day FREE trial membership for Grant Connect  
15 where you can get easy access to free government money. After the 15-day trial,  
16 unless you cancel, Grant Connect will charge your account \$19.95 each month  
17 thereafter. You have the right to cancel any time by calling the toll-free number  
18 located at grantconnect.com.

19 As an additional bonus, you will also receive a FREE 10 day trial of Vcomm300  
20 International and Long Distance Calling Service. Unless you cancel, Vcomm300  
21 will bill your account \$14.95 for the services each month thereafter. You have  
22 the right to cancel anytime by calling the toll-free number located at  
23 vcomm300.com.

24 Am. Compl. [D.E. 112] ¶ 79.

25 Buried in paragraph 23 of First Plus Platinum’s eight page, single spaced Member

1 Agreement is the following language:

2 PROMOTIONAL OFFERS: As the First Plus Platinum Offer Terms and  
3 Conditions and web site indicated, I accepted enrollment for up to 2 additional  
4 promotional product offers using the relevant data I entered for the First Plus  
5 Platinum Offer. The following are links to Terms of all our affiliated third party  
6 promotional offers: Grant Connect, Vcomm300, VCommUnlimited, CarExpress,  
7 Premier Plus Member. For additional information regarding the offers I signed  
8 up for, I can refer to the website where I signed up, or I can call Customer  
9 Service at 1-800-595-5110.

10 Am. Compl. [D.E. 112] ¶ 80, Px. 7 (a print out of one version of the First Plus Platinum Member  
11 Agreement).

12 In numerous instances, consumers learn they have been enrolled in Grant Connect's  
13 membership program only after their accounts have been charged monthly fees for Grant  
14 Connect. Am. Compl. [D.E. 112] ¶ 81.

15 **f. Defendants' Debiting of Consumers' Bank Accounts Without Written**  
16 **Authorization**

17 In numerous instances, Defendants have debited consumers' bank accounts on a recurring  
18 basis without obtaining a written authorization signed or similarly authenticated from consumers  
19 for preauthorized electronic fund transfers from their accounts.

20 In numerous instances, Defendants have debited consumers' bank accounts on a recurring  
21 basis without providing a copy of a written authorization signed or similarly authenticated by the  
22 consumer for preauthorized electronic fund transfers from the consumer's account. Am. Compl.  
23 [D.E. 112] ¶ 109.

24 **4. Consumer Injury**

25 Consumers have suffered and will continue to suffer substantial injury as a result of

1 Defendants' violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) & 52, Section  
 2 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, as set forth  
 3 above. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or  
 4 practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure  
 5 consumers, reap unjust enrichment, and harm the public interest. Am. Compl. [D.E. 112] ¶ 112.

### 6 **III. LEGAL ARGUMENT**

#### 7 **A. THE FTC'S AMENDED COMPLAINT ADEQUATELY PLEADS VIOLATIONS** 8 **OF THE FTC ACT AGAINST DEFENDANT JOHNNIE SMITH**

9 Realizing that the Amended Complaint more than satisfies Rule 8, which requires only a  
 10 "short and plain statement showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2),  
 11 Smith argues that Counts I-VII of the FTC's Amended Complaint should be dismissed pursuant  
 12 to Rule 9(b)'s heightened pleading requirements. Smith Mot. [D.E. 149] at 6-8. This argument  
 13 lacks merit. First, Rule 9(b) does not apply to the Amended Complaint, which neither alleges  
 14 that Smith engaged in fraud nor "sounds in fraud." Second, even if Rule 9(b) did apply, the  
 15 Amended Complaint satisfies its pleading standards.

#### 16 **1. Rule 9(b)'s Heightened Pleading Requirements Do Not Apply To The Claims** 17 **Alleged In The FTC's Amended Complaint**

18 Smith's argument that Counts I-VII of the Amended Complaint fail to meet Rule 9(b)'s  
 19 heightened pleading standards is based on a faulty premise—that the FTC's claims allege fraud  
 20 or "sound in fraud." Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with  
 21 particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and  
 22 other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Thus, Rule  
 23 9(b) only applies where a complaint "sounds" or is "grounded" in fraud. *Vess v. Ciba-Geigy*  
 24 *Corp. U.S.A.*, 317 F.3d 1097, 1103 (9th Cir. 2003). Here, instead of alleging fraud, the FTC  
 25 claims that the Defendants, including Smith, violated Sections 5(a) and 12 of the FTC Act by

1 engaging in deception and false advertising. Claims for deception and false advertising under  
2 the FTC Act are not fraud claims, do not “sound” in fraud, and should not be treated as such for  
3 purposes of determining whether to apply Rule 9(b)’s heightened pleading requirements. *FTC v.*  
4 *Freecom Communs., Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) (“A §5 claim simply is not a  
5 claim of fraud as that term is commonly understood or as contemplated by Rule 9(b), and the  
6 district court’s inclination to treat it as such unduly hindered the FTC’s ability to present its  
7 case.”). *See also, FTC v. Communidyne, Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,439 at 71,313  
8 (N.D. Ill. 1993) (holding that Rule 9(b) does not apply to violations of the FTC Act).

9       There are compelling reasons of law and policy for not applying the pleading standards of  
10 Rule 9(b) to FTC actions that are not subject to the requirements of common law fraud actions.  
11 An FTC action is “not a private or common law fraud action designed to remedy a singular harm,  
12 but a government action brought to deter deceptive acts and practices aimed at the public and to  
13 obtain redress on behalf of a large class of third-party consumers who purchased Defendants’  
14 products and services over an extended period of time.” *Freecom*, 401 F.3d at 1204 n.7 (citing  
15 *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991)). For this  
16 reason, unlike a private litigant alleging common law fraud, the FTC need not prove scienter,  
17 reliance, or injury to establish a violation of the FTC Act. *See Freecom*, 401 F.3d at 1204 n.7.  
18 Given the nature of FTC actions, demanding strict compliance with Rule 9(b) and requiring the  
19 FTC to allege each individualized act of deception would be highly impractical and inconsistent  
20 with the purpose of the FTC Act. *See Freecom*, 401 F.3d at 1204 n.7.

## 21       **2. The Amended Complaint Satisfies Rule 9(b)’s Heightened Pleading** 22       **Requirements**

23       Even if Rule 9(b) were applicable to claims for deception and false advertising under the  
24 FTC Act, Counts I-VII of the Amended Complaint satisfy the requirements of the Rule. This  
25 Court recently described the requirements necessary to satisfy the burden of pleading with

1 particularity under Rule 9(b) in the context of a securities fraud action<sup>2</sup> as follows:

2 To satisfy this burden, the complaint “ ‘must set forth more than the neutral facts  
3 necessary to identify the transaction.’ ” The “neutral facts” mean the “ ‘time,  
4 place, and content of an alleged misrepresentation.’ ” In addition to pleading  
5 these neutral facts, the plaintiff “ ‘must set forth what is false or misleading about  
6 a statement, and why it is false. In other words, the plaintiff must set forth an  
7 explanation as to why the statement or omission complained of was false or  
8 misleading.’ ”

9 *FSP Stallion I v. Luce*, No. 2:08-CV-01155-PMP-PAL, 2009 WL 1219683 at \*3 (D. Nev. May  
10 1, 2009) (internal citation omitted) (quoting *Yourish v. Cal. Amplifer*, 191 F.3d 983, 993 (9th Cir.  
11 1999) (quoting *In re GlenFed Sec. Lit.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc))).

12 The Amended Complaint satisfies this burden. Defendants’ deceptive schemes, including  
13 Grant Connect, First Plus Platinum, One Hour Wealth Builder, and Acai Total Burn, are  
14 described in detail in the Amended Complaint. *See supra* Section II.B.3.; Am. Compl. [D.E.  
15 112] ¶¶ 3, 39-81, 84-85, 87-88, 90-91, 93-94, 96-97, 102-03. The content of the deceptive  
16 advertising is quoted and summarized in the body of the Amended Complaint and copies of the  
17 relevant Internet advertisements containing the deceptive claims are attached as exhibits. *See*  
18 *supra* Section II.B.3.; Am. Compl. [D.E. 112] ¶¶ 42-47, 50-53, 57-59, 63-64, 67-70, 73-75, 77-  
19 80, 87-88, 90-91, 93-94, 96-97, 102-03, Pxs. 1-7, 578 & 579. The Amended Complaint also sets

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20  
21 <sup>2</sup> Unlike a claim for common law fraud or securities fraud, the FTC need not prove intent,  
22 reliance, or injury to establish violations of Sections 5 and 12 of the FTC Act. *FTC v. Publ’g*  
23 *Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Figgie Int’l*, 994 F.2d 595,  
24 605-06 (9th Cir. 1993); *Freecom*, 401 F.3d at 1204 n.7. Instead, the FTC need only show that a  
25 defendant made a material misrepresentation or omission that is likely to mislead consumers,  
acting reasonably under the circumstances, to their detriment. *See, e.g., FTC v. Pantron I Corp.*,  
33 F.3d 1088, 1095 (9th Cir. 1994, cert. denied, 514 U.S. 1083 (1995)). Thus, even if Rule 9(b)  
applies to the FTC’s claims, it is not required to allege intent, reliance, or injury since they are  
not elements of a claim for deception or false advertising under the FTC Act.



1 forth an explanation as to why Defendants' various advertising campaigns are deceptive. *See*  
2 *supra* Section II.B.3.; Am. Compl. [D.E. 112] ¶¶ 48 (explaining that Defendants' claims about  
3 Grant Connect are deceptive because consumers using Grant Connect are not likely to obtain a  
4 grant), 54 (explaining that Defendants' line of credit offers are deceptive because consumers who  
5 sign up for them do not get a general purpose unsecured credit card or line of credit), 60  
6 (explaining that earnings claims made in marketing Defendants' work-from-home schemes are  
7 deceptive and unsubstantiated because few, if any, consumers who sign up for them earn the  
8 substantial income promised by Defendants), 65 (explaining that health claims regarding Acai  
9 Total Burn were unsubstantiated), 75-76 (explaining why Defendants' "Offer Details" fail to  
10 adequately inform consumers of the material terms and conditions of their offers), 81 (same).

11 With regard to time and location, the Amended Complaint identifies specific web sites  
12 where Defendants' advertising claims were made to consumers throughout the United States on  
13 numerous occasions. Am. Compl. [D.E. 112] ¶¶ 39, 41, 49, 55, 61. The Amended Complaint  
14 also makes clear that the deception is ongoing. *See* Am. Comp. [D.E. 112] ¶112 (alleging that  
15 "[c]onsumers have suffered and will continue to suffer substantial injury.") While the Amended  
16 Complaint does not identify the specific time and location of particular consumer transactions,  
17 that level of specificity is not required by Rule 9(b) where, as here, the alleged conduct is part of  
18 a complex scheme occurring over a long period or involving numerous occurrences. *See United*  
19 *States v. Sheikh*, 583 F. Supp.2d 434, 439 (W.D.N.Y. 2008) (citing *United States ex rel. Karvelas*  
20 *v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 n.14 (1st Cir. 2004)).

21 Smith erroneously argues that the Amended Complaint failed to identify his role and  
22 "simply lumped all of the Defendants together." Smith Mot. [D.E. 149] at 7. Under the FTC  
23 Act, an individual defendant is liable for injunctive relief if he "directly participated" in a  
24 corporate defendant's unlawful practices *or* "had authority to control" the corporate defendant.  
25 *E.g.*, *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999); *FTC v. Publ'g*

1 *Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Bay Area Bus. Council*, 423  
2 F.3d 627, 636 (7th Cir. 2005); *Freecom*, 401 F.3d at 1203. To obtain restitution or disgorgement  
3 from Smith as an individual defendant in control of a corporate defendant, the FTC will be  
4 required to prove that he “knew or should have known” that the corporate defendants engaged in  
5 the wrongful conduct. *See, e.g.*, *Publ’g Clearing House, Inc.*, 104 F.3d at 1171.

6 The Amended Complaint alleges that Smith (1) served as Executive Director of  
7 Corporate Defendant Vantex, and (2) “formulated, directed, controlled, had the authority to  
8 control, or participated in the acts and practices of Vantex and/or one or more of the other  
9 business entities named [in the Amended Complaint], including the acts or practices set forth [in  
10 the Amended Complaint]. *See supra* Section II.B.1.; Am. Compl. ¶¶ 36. Counts I-VII of the  
11 Amended Complaint thus state claims for an injunction against Smith. The allegations that the  
12 Corporate Defendants, including Vantex, routinely engaged in deceptive practices while Smith  
13 was one of the individuals at the helm of these companies gives rise to the reasonable inference  
14 that Smith knew or at the very least should have known of the deceptive practices. More  
15 specificity with regard to Smith’s knowledge is not required even under Rule 9(b) where, as  
16 here, many of the additional relevant facts are peculiarly within the opposing party’s control.  
17 *See e.g.*, *Sheikh*, 583 F. Supp.2d at 438 (“Rule 9(b) ‘requirement is relaxed somewhat when the  
18 relevant facts are peculiarly within the opposing party’s knowledge.’”) When the FTC takes  
19 Smith’s deposition, which is scheduled to take place in Miami, Florida on June 9, 2010, we will  
20 know much more about exactly what Smith knew and when he knew it.

21 In addition to alleging the role that Smith played as Vantex’s Executive Director, the  
22 Amended Complaint alleges that all of the Defendants, including Smith, directly participated in  
23 the deception. Smith argues, citing the Ninth Circuit’s decision in *Swartz v. KPMP LLP*, 476  
24 F.3d 756 (9th Cir. 2007), that the Amended Complaint is deficient in this regard because it fails  
25 to make individualized allegations against each of the defendants. Smith Mot. [D.E. 149] at 6.

1 However, it is well established that, “[w]hen multiple defendants are named in a complaint, the  
2 allegations can be and usually are to be read in such a way that each defendant is having the  
3 allegation made about him individually.” *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir.  
4 1997). This makes particular sense where, as here, the defendants are alleged to have jointly  
5 engaged in the same deceptive conduct and to have operated as a common enterprise. It would  
6 be wholly redundant (and would serve no purpose) for the Amended Complaint to contain  
7 identical paragraphs for each of the defendants.

8         The *Swartz* decision neither eviscerates the use of the plural “Defendants” in all  
9 pleadings nor does it impose an “absolute requirement that where several defendants are sued in  
10 connection with an alleged fraudulent scheme, the complaint must identify false statements made  
11 by each defendant.” 476 F.3d at 764. What *Swartz* requires is that plaintiffs in fraud suits  
12 identify the role of each defendant. *Id.* at 765. Here, the Amended Complaint does not merely  
13 lump Smith together with all of the Defendants. Instead, the Amended Complaint: (1) identifies  
14 Smith’s role as Vantex’s Executive Director; (2) explains that Vantex and the other Corporate  
15 Defendants operated as a common enterprise while engaging in the alleged deception and law  
16 violations; and (3) explains that the Individuals Defendants, including Smith, formulated,  
17 directed, controlled, had authority to control, or participated in the acts and practices of the  
18 common enterprise. Only after delineating Smith’s role as one of the control persons running the  
19 common enterprise, does the Amended Complaint begin to use the plural “Defendants” to  
20 describe the deceptive and false advertisements that all of the Defendants, including Smith,  
21 collectively prepared and disseminated. This is similar to the pleading permitted under the group  
22 pleading doctrine. “Under this doctrine, plaintiffs may rely on a presumption that statements in ‘  
23 “prospectuses, registration statements, annual reports, press releases, or other ‘group published  
24 information,’ ’ are the collective work of those individuals in the everyday business of the  
25 company.” *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1108 (D. Nev. 1998)

1 (quoting *In re GlenFed Sec. Litig.*, 60 F.3d 591, 593 (9th Cir. 1995)).

2 **B. THE FTC’S EFTA CLAIMS ARE NOT TIME-BARRED**

3 Smith mistakenly argues that Count VIII of the Amended Complaint, alleging violations  
4 of the EFTA, is time-barred pursuant to the one-year statute of limitations contained in 15 U.S.C.  
5 § 1693m(g). This limitations period applies only to private actions and does not apply to EFTA  
6 claims brought by the FTC pursuant to its enforcement authority under 15 U.S.C. § 1693o(c).  
7 Section 1693m, which contains the one-year limitations period, is entitled “Civil liability” and  
8 provides consumers with a private right of action. *See* 15 U.S.C. § 1693m(a). The relevant  
9 subsection imposing the one-year limitation period makes clear that it only applies to “any action  
10 under this section.” 15 U.S.C. § 1693m(g). The present enforcement action is covered by  
11 Section 1693o, which is entitled “Administrative enforcement” and gives the FTC overall  
12 enforcement authority for violations of the EFTA. 15 U.S.C. § 1693o(c). Section 1693o does not  
13 contain a statute of limitations and authorizes the FTC to use “[a]ll of the functions and powers”  
14 of the FTC under the FTC Act to enforce compliance with the requirement imposed under the  
15 EFTA. Such powers include the power to apply to federal district courts for injunctive and  
16 equitable relief, as well as the power to seek relief as is necessary to redress consumer injury.  
17 Where, as here, the FTC seeks equitable relief under Section 13(b) of the FTC Act, 15 U.S.C. §  
18 53(b), there is no statute of limitations. *FTC v. Minuteman Press*, 53 F.Supp.2d 248, 263  
19 (E.D.N.Y. 1998); *FTC v. U.S. Oil & Gas Corp.*, No. 83-1702-CIV-WMH, 1987 U.S. Dist.  
20 LEXIS 16137 at \*81 (S.D. Fla. Jul. 10, 1987).

21 Even if the one-year limitation period in Section 1693m somehow applied, Count VIII  
22 would survive because the Amended Complaint relates back to the date of the Original  
23 Complaint pursuant to Rule of Civil Procedure 15(c)(1)(C). An amendment to a pleading relates  
24 back where, as here, the Amended Complaint “asserts claims that arose out of the conduct,  
25 transaction, or occurrence set out—or attempted to be set out—in the original pleading;” and

1 “the party to be brought in by the amendment: (i) received such notice of the action that it will  
2 not be prejudiced in defending on the merits; and (ii) knew or should have known that the action  
3 would have been brought against it, but for a mistake concerning the proper party’s identity.”  
4 FED. R. CIV. P. 15(c)(1)(C). As Vantex’s Executive Director, Smith would have learned about  
5 the present action shortly after the entry of the July 28 TRO against Vantex freezing its assets  
6 and requiring Vantex to distribute the order to each of its officer, agents, and employees. Given  
7 that he was one of Vantex’s highest ranking executives and his previous experience with the  
8 FTC,<sup>3</sup> Smith knew or should have known that he would have been named in the Original  
9 Complaint if the FTC had known about his role in the practices alleged therein.

10 Even without relation back and assuming a one-year limitations period, the Defendants’  
11 EFTA violations were ongoing at the time of the July 28, 2009 TRO and, therefore, would not be  
12 time barred until July 28, 2010—one year after Defendants’ EFTA violations were enjoined. *See*  
13 P.I. Order [D.E. 83] at p. 18 (“There is good cause to believe that immediate and irreparable  
14 harm will result from Las Vegas Defendants’ ongoing violations of the FTC Act, the EFTA, and  
15 Regulation E...”); Am. Compl. [D.E. 112] ¶ 112 (“Consumers have suffered and will continue to  
16 suffer substantial injury of Defendants’ violations...”).

17 **C. DEFENDANT SMITH HAS FAILED TO SHOW GOOD CAUSE FOR STAYING**  
18 **DISCOVERY**

19 Smith also demands that the FTC “be prohibited from conducting discovery regarding its  
20 claims against Johnnie Smith” pending the outcome of his Motion to Dismiss. However, Smith  
21 has failed to demonstrate the requisite good cause for staying discovery. Ordinarily, the  
22 pendency of a motion to dismiss will not justify a stay of discovery. *Turner Broadcasting*

23 \_\_\_\_\_  
24 <sup>3</sup> Smith is under a permanent injunction in *FTC v. Capital Choice Consumer Credit, Inc.*, Civ  
25 No. 02-21050 (S.D. Fla. 2002), a lawsuit arising from his activities in the deceptive sale and  
marketing of advance fee credit cards—a deceptive scheme very similar to the “line of credit”  
scheme alleged in the Amended Complaint. *See* Px. 598, Final Judgment in *FTC v. Capital  
Choice Consumer Credit, Inc., et al.*





**SERVICE LIST**

*Federal Trade Commission v. Grant Connect, et al., Case No. 2:09-CV-01349-PMP-RJJ*

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